

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 01-21**

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.

SUBJECT

Application of Tennessee sales and use tax to the installation of above-ground and below-ground swimming pools and spas.

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the department by the taxpayer. The rulings herein are binding upon the Department and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time.

Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling; and a retroactive revocation of the ruling must inure to the taxpayer's detriment.

FACTS

[TAXPAYER] is in the business of constructing and installing above-ground and below-ground swimming pools and spas, primarily for residential homeowners. Upon contracting with a customer for the installation of a pool or spa, taxpayer first prepares the site where the pool is to be installed. These preparations include the grading and

excavation of the site, the installation of a permanent foundation for the pool or spa, and installing the necessary plumbing fixtures to service the pool or spa.

Thereafter, in the case of an above-ground pool or spa, taxpayer assembles, on site, the pre-manufactured pool purchased from a third-party supplier. In the case of an in-ground pool, taxpayer constructs the pool on site using building materials purchased from third-party suppliers. The materials purchased for the installation of an in-ground pool are expended in the construction of the pool.

After installation of a pool or spa, taxpayer installs the pump, filtration system, and other necessary equipment required to maintain the pool. That equipment is then permanently connected to the plumbing of the customer's residence. Both above- and below-ground pools and spas are permanent improvements to the real estate and cannot be readily moved or disassembled.

ISSUES

1. Is the taxpayer required to collect sales tax on the sale and installation of an above-ground pool or spa?
2. Is the taxpayer required to collect sales tax on the sale and installation of in-ground pools or spas?
3. If the taxpayer is required to collect sales tax, should sales be charged on (a) the value of the above-ground pool kit? (b) the value of the materials to construct an in-ground pool? (c) the value of the labor to install the pool? (d) the amount of profit in the sales price? (e) the installation charges?
4. Does T.C.A. §67-6-209(c) exempt taxpayer's sale and installation of an above-ground pool or spa from sales tax?
5. Does T.C.A. §67-6-209(c) exempt taxpayer's sale and installation of an in-ground pool or spa from sales tax?

RULINGS

1. The taxpayer is not required to collect sales tax on the sale and installation of an above ground pool or spa, assuming the pool or spa becomes real property upon installation.
2. The taxpayer is not required to collect sales tax on the sale and installation of an in-ground pool or spa, assuming the pool or spa becomes real property upon installation.

3. While the taxpayer is not required to collect sales tax on its sale of pools and spas which it installs as real property, including all of the lettered items above, it is liable to pay sales or use tax on its purchase of above ground pool kits, its purchase of materials used to construct an in-ground pool, its purchase of a spa, or the purchase of any materials and supplies used in installing the pools and spas. In a case where the pool or spa, upon installation, remains tangible personal property, the sales tax should be collected and remitted on the sales price of the pool, including any charge for installation labor.
4. T.C.A. § 67-6-209(c) does not apply to the taxpayer's sale and installation of an above-ground pool or spa; therefore, it does not provide an exemption.
5. T.C.A. § 67-6-209(c) does not apply to the taxpayer's sale and installation of an in-ground pool or spa; therefore, it does not provide an exemption.

ANALYSIS

The first question to be answered in addressing all of the issues raised by the taxpayer is whether the pools and spas are real property or tangible personal property. T.C.A. § 67-6-202 subjects the retail sale of tangible personal property to sales tax. On the other hand, the sale of an item that, once installed, becomes real property is not subject to sales tax. There is no levy of sales or use tax that encompasses the sale of real property or the service of improving real property.

Whether tangible personal property that is installed remains tangible personal property after installation or becomes part of the realty must be determined on a case-by-case basis by applying the law of fixtures to the factual circumstances that exist.

The primary test for distinguishing tangible personal property from fixtures is not so much the manner in which the property is affixed to the realty as it is the intention with which the property is connected with the realty. The Tennessee Supreme Court has stated the test as follows:

“In Tennessee only those chattels are fixtures which are so attached to the freehold that, from the intention of the parties and the use to which they are put, they are presumed to be permanently annexed, or a removal thereof would cause serious injury to the freehold. The usual test is said to be the intention with which a chattel is connected with realty. If it is intended to be removable at the pleasure of the owner, it is not a fixture.”

Magnovox Consumer Electronics v. King, 707 S.W.2d 504, 507 (Tenn. 1986)(quoting *Hickman v. Booth*, 173 S.W.2d 438 (Tenn. 1974)).

Such intent may be shown by examining both objective and subjective factors. See *Hubbard v. Hardeman County Bank*, 868 S.W.2d 656, 660 (Tenn. Ct. App. 1993).

Objective factors include the type of structure, the mode of attachment, and the use and purpose of the property. *Harry J. Whelchel Company v. King*, 610 S.W.2d 710, 713-714 (Tenn. 1980). The subjective factor is the expressed intent, if any, of the parties. *See, Id.* Tangible personal property becomes a part of the realty, though, if removing it would seriously damage the building to which it is affixed. *Process Systems, Inc. v. Huddleston*, 1996 Tenn. App. LEXIS 695 (Tenn. Ct. App. October 25, 1996)(citing *Memphis Housing Authority v. Memphis Steam Laundry-Cleaners, Inc.*, 463 S.W.2d 677, 679 (Tenn. 1971)). Tangible personal property also becomes realty if removal would destroy its essential character as personalty. *Id.* (citing *Green v. Harper*, 700 S.W.2d 565, 567 (Tenn. Ct. App. 1985)).

Thus, whether the personal property at issue becomes part of the realty depends on the particular factual circumstances that exist. For example, the court in *General Carpet Contractors, Inc. v. Tidwell*, 511 S.W.2d 241 (Tenn. 1974), examined carpet which was laid using the tackless strip method and was therefore easily removable. The court found that the carpet became realty because the parties installed it with the intent that it remain in place for the length of its useful life. *Id.* at 243. In another case, the court found that removal of the conveyor system at issue would damage the building and destroy the essential character of the conveyor system. *Process Systems, Inc., supra*. Accordingly, the conveyor system was held to be an improvement to real property. *Id.*

In the facts presented here, the pools and spas are installed only after grading and excavation, are installed on permanent foundation, and are connected to the plumbing. They cannot be readily moved or disassembled. Most importantly, the ruling request states that the items are permanent improvements to the real estate. Therefore, unless a contrary intent appears for a particular transaction, the pools and spas will be considered real property for purposes of this ruling.

Issues (1) and (2) in the ruling request inquire as to whether the taxpayer is required to collect sales tax on its sales and installation of pools and spas. Since no sales tax is due on the sale of real property, in a case where the item becomes realty upon installation, the sale and installation of the items is not subject to sales tax, and the taxpayer is not required to collect sales tax thereon.

If there is a case where the item does not become real property upon installation, tax is due upon the sale price, as that term is defined in T.C.A. § 67-6-102(26).¹

Issue (3) presented by the taxpayer inquires as to whether the taxpayer is required to collect sales tax on particular components of the charge to the customer. As explained previously, no sales tax is required to be collected on the sale or improvement to real property. However, it is important to note that the taxpayer is liable for the payment of sales or use tax, based on its purchase price, on all components of the pools and spas.

TENN. COMP. R. & REGS. 1320-5-1-.07(1) states:

Contractors engaged in constructing or improving real property, whether on a lump sum or a cost-plus basis, are purchasers and consumers of the materials used by them, and are required to pay the Sales or Use Tax on such materials or equipment purchased or imported into this State for use in connection with their contracts.

In the event of a purchase from a Tennessee vendor, the tax referred to in the rule is the sales tax levied by T.C.A. § 67-6-202. In the case of a non-Tennessee vendor, the tax is a use tax, which is levied by T.C.A. §§ 67-6-203 and/or 67-6-210.

As already explained, in a case where a pool or spa remains tangible personal property after installation, the tax is due on the sales price.

Issues (4) and (5) in the ruling request inquire as to the applicability of T.C.A. § 67-6-209(c) to the taxpayer's sale of pools and spas. That subsection states:

The tax **imposed by this section** shall have no application where the contractor or subcontractor, and the purpose for which such tangible personal property is used, would be exempt from the sales or use tax under any other provision of this chapter. However, the transfer of tangible personal property by a contractor who contracts for the installation of such tangible personal property as an improvement to realty does not constitute a sale, except as provided in § 67-6-102(8), and the contractor shall not be permitted on this basis to obtain the benefit of any exemptions or reduced tax rates available to manufacturers under § 67-6-206 or § 67-6-102(24)(E). Each location of a taxpayer will be considered separately in determining whether the taxpayer qualifies or is disqualified as a manufacturer at that location.

(Emphasis added.)

T.C.A. § 67-6-209, commonly referred to as the contractors' use tax, provides for a use tax in certain situations where property used by a contractor has escaped full taxation previous to the contractor's use of the property. In an early case involving the contractors use tax, *United States v. Boyd*, 211 Tenn.139, 363 S.W.2d 193 (1962), the Tennessee Supreme Court made the following statement in reference to the statutory amendments that enacted the contractors' use tax:

They expressly impose a tax upon the privilege of use by a contractor of tangible personal property, regardless of the title, **where such property has not previously borne a sales or use tax.**

(Emphasis added.) *Id.* at 163.

As explained in the proceeding, the tax due on the purchase of the materials used to construct the items which are the subject of this ruling is levied by code sections other

than T.C.A. § 67-6-209, as a sales or use tax imposed under T.C.A. §§ 67-6-202, 67-6-203, or 67-6-210. Since the tax on the materials is levied by a code section other than T.C.A. § 67-6-209, T.C.A. § 67-6-209(c) apply. T.C.A. § 67-6-209(c) does not itself provide an exemption; rather, it states that T.C.A. § 67-6-209 does not impose a tax where an exemption statute may apply.

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Tax Counsel

APPROVED: Ruth E. Johnson
Commissioner

DATE: October 16, 2001

¹ T.C.A. § 67-6-102(26) states:

“Sales price” means the total amount for which a taxable service or tangible personal property is sold, including any services that are a part of the sale of tangible personal property, valued in money, whether paid in money or otherwise and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service costs, losses, or any other expense whatsoever; provided, that cash discounts allowed and taken on sales shall not be included; provided that “sales price” does not include any additional consideration given by the purchaser for the privilege of making deferred payments, regardless of whether such additional consideration shall be known as interest, time price differential on conditional sales contracts, carrying charges or any other name by which it shall be known; provided that “sales price” does not include any federal retail excise tax imposed by §§ 4051-4053 of the Internal Revenue Code of 1954, as amended, or such as such tax may be amended hereafter; and provided further, that “sales price” does not include federal excise tax on diesel fuel purchased for off-road use as provided in title 67, chapter 3, whether or not such tax is required by law to be passed on to the ultimate consumer.